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No. 82-788

In the Supreme Court of the United States

OCTOBER TERM, 1982

D. L. JONES,
Petitioner,

vs.

THE STATE OF OKLAHOMA,
Respondent.

On Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Petitioner's failure to object to the instruction on voluntary intoxication, his failure to submit an instruction designed to correct any impropriety or inadequacy in the trial court's instruction, and his failure to raise said issue upon appeal, prior to his petition for rehearing, waive any error in the instruction?

2. Did the instructions, considered as a whole, fairly and accurately state the applicable law so as to apprise the jury of lesser included crimes?

3. Was there a constitutional violation of the due process clause of the Fourteenth Amendment because of the manner in which the M'Naghten Rule of legal sanity was applied?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2-3
STATEMENT OF THE CASE	3
A. Procedural Background of the Case	3
B. Relevant Facts Underlying the Petitioner's Conviction	4
SUMMARY OF ARGUMENT	7
REASONS WHY THE WRIT SHOULD BE DENIED:	
I. Instructions given to the jury are left to the discretion of the Trial Court and the instructions, considered as a whole, fairly and accurately stated the applicable law	8
A. The Petitioner neither objected to the instruction on voluntary intoxication nor did he submit any instruction designed to correct any impropriety or inadequacy in the trial court's instruction and raised this issue for the first time in his Petition for Rehearing, therefore, any error has been waived	8
B. The instructions given to the jury, considered as a whole, fairly and accurately stated the applicable law	11
II. The manner in which the M'Naghten Rule of legal sanity was applied, which is the sole test used within the State of Oklahoma, did not deprive the Petitioner of due process	16
CONCLUSION	21
APPENDIX:	
Excerpt from Report of the Trial Judge	

TABLE OF AUTHORITIES

Cases	PAGE(S)
Cupp v. *Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)	12
Duisen v. *Wyrick*, 566 F.2d 616 (8th Cir. 1977)	18
Eddings v. *Oklahoma*, ___ U.S. ___, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)	15
Fredrick v. *United States*, 163 F.2d 536 (9th Cir. 1947), *cert. denied*, 332 U.S. 775, 68 S.Ct. 87, 92 L.Ed. 360 (1947)	9
Henderson v. *Kibbe*, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977)	9-10
Hill v. *Lockhart*, 516 F.2d 910 (8th Cir. 1975)	18
Holloway v. *State*, 550 P.2d 1352 (Okl.Cr. 1976)	13
Hopt v. *People*, 104 U.S. 631, 26 L.Ed. 873 (1881)	12
Humes v. *United States*, 170 U.S. 210, 18 S.Ct. 602, 42 L.Ed. 1101 (1898)	8-9
Jones v. *State*, 648 P.2d 1251 (Okl.Cr. 1982)	15
Leland v. *Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952)	17
Lumetta v. *United States*, 362 F.2d 644 (8th Cir. 1966)	13
Matter of M.E., 584 P.2d 1340 (Okl.Cr. 1978), *cert. denied*, 436 U.S. 921, 98 S.Ct. 2271, 56 L.Ed.2d 763 (1978)	16
Miller v. *State*, 567 P.2d 105 (Okl.Cr. 1977)	13, 14
Myers v. *State*, 623 P.2d 1035 (Okl.Cr. 1981)	8
Patterson v. *New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)	18-19
Phillips v. *State*, 321 P.2d 724 (Okl.Cr. 1958)	12
Phillips v. *Hocker*, 473 F.2d 395 (9th Cir. 1973)	17
Richardson v. *State*, 569 P.2d 1018 (Okl.Cr. 1977)	16
Tucker v. *State*, 151 U.S. 164, 14 S.Ct. 299, 38 L.Ed. 112 (1894)	9

AUTHORITIES CONTINUED **PAGE(S)**

United States v. *Anderson*, 471 F.2d 201 (5th Cir. 1973) 8
United States v. *D'Amico*, 408 F.2d 331 (2d Cir. 1969) 8
United States v. *Garcia-Rodriguez*, 558 F.2d 956 (9th Cir. 1977), *cert. denied*, 434 U.S. 1050, 98 S.Ct. 900, 54 L.Ed.2d 802 11

United States Constitution

Amendment XIV, § 1 2

Oklahoma Statutes

21 O.S.1981, § 153 12
21 O.S.1981, § 701.7 ..... 2, 3
21 O.S.1981, § 711 2-3

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, the State of Oklahoma, by and through Jan Eric Cartwright, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Oklahoma Court of Criminal Appeals entered in this case on July 26, 1982.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals in this case was published and appears at 648 P.2d 1251 (Okl.Cr. 1982) and is appended to the Petition for Writ as Appendix A.

JURISDICTION

The petitioner is seeking a Writ of Certiorari to the Oklahoma Court of Criminal Appeals in order to review a judgment entered on July 26, 1982. A timely Petition for Rehearing was denied by the Oklahoma Court of Criminal Appeals on September 10, 1982. Jurisdiction is invoked under 28 U.S.C. § 1257(3) because the petitioner asserts the deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution, Amendment XIV, Section 1, provides, in pertinent portion:

> ". . . Nor shall any state deprive any person of life, liberty or property, without due process of law . . ."

2. Title 21 O.S.1981 Section 701.7, provides in pertinent portion:

> *Murder in the First Degree.* "(A) A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifcsted by external circumstances capable of proof."

3. Title 21 O.S.1981 Section 711 provides, in pertinent portion:

> *Manslaughter in the first degree defined.* "Homicide is manslaughter in the first degree in the following cases:
>
> * * *

2. When perpetrated without a design to effect death and in the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under circumstances as to constitute excusable or justifiable homicide."

STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND OF THE CASE

D. L. Jones, Jr., subsequently referred to as the petitioner, was tried for the crimes of Murder in the First Degree and two (2) counts of Assault and Battery with a Deadly Weapon in violation of 21 O.S.1981, § 701.7 and 21 O.S.1981, § 652, respectively, in Case Nos. CRF-79-372, CRF-79-373, and CRF-79-374 in the District Court of Comanche County before the Honorable William M. Roberts. The defendant was represented by counsel. The jury returned a verdict of guilty upon the charge of Murder in the First Degree and set punishment at death. The jury also returned verdicts of guilty upon the two (2) counts of Assault and Battery with a Deadly Weapon and set punishment at twenty (20) years and twelve (12) years respectively. The trial court sentenced the defendant in accordance with the verdict.

The Oklahoma Court of Criminal Appeals affirmed all three (3) convictions and also affirmed the sentence of death.

The petitioner timely petitioned the Court of Criminal Appeals for a rehearing based upon a failure of the trial court to give a proper instruction on voluntary intoxication. A copy of petitioner's Petition for Rehearing in the

Oklahoma Court of Criminal Appeals is appended to the Petition as Appendix B. The Oklahoma Court of Criminal Appeals denied the petitioner's Petition for Rehearing, a copy of said denial is appended to the Petition as Appendix C.

B. RELEVANT FACTS UNDERLYING THE PETITIONER'S CONVICTION

On March 14, 1979, the petitioner entered the Saloon Bar and joined a party of three, two of whom were females. The petitioner's wife telephoned the bar in search of the petitioner and spoke with the barmaid who testified that the wife might stop at the bar. Unknown to the petitioner and to avoid a confrontation, one of the females left the bar. When the petitioner realized that his companion had departed he became angry. The petitioner left the Saloon Bar and went across the street to the Wichita Lounge. The barmaid at the Wichita noticed a gun protruding from the petitioner's boot and asked the petitioner to pull his pant leg down so that the gun would be covered. The petitioner responded, "Shut your mouth or I'll blow your head off" (Tr. 402). The petitioner then stated that, "I come down here to kill every son-of-a-bitch in here" (Tr. 428, 498).

The petitioner removed his gun and began to indiscriminately fire it. The petitioner shot the decedent twice and mocked the decedent as he lay bleeding to death. The petitioner then turned to the decedent's son and stated "And now I'm going to get you." The petitioner also stated to him that, "If I let you live, you'll tell the cops, won't you?" As a result of the injuries inflicted by the shoot-

ing, the son spent three (3) weeks in an intensive care unit, his left side became paralyzed and he needs a brace to walk. He also required a tracheotomy.

The petitioner's female companion also was shot. She was able to exit the Wichita Lounge, return to the Saloon Bar, and tell her friends that the petitioner was over at the Wichita shooting everybody. Her spleen had to be removed as a result of the shooting (Tr. 407).

After the shooting spree had ended the petitioner said, "I've killed every son-of-a-bitch in here, I guess I'll get me a beer." The son heard his father moaning, got to his feet, and was able to exit from the Wichita. As the son approached a fruit stand across the street he motioned to call the police because he was unable to talk. The petitioner was seen exiting the Wichita with a gun in his hand. The police and an ambulance were summoned.

A description of the petitioner and his vehicle was given to the police. The description was dispatched to officers on patrol. Two detectives went to the suspect's residence and waited. Five minutes later the petitioner drove up and the officers pulled into the driveway behind the petitioner's vehicle. The petitioner was ordered out of the vehicle, was handcuffed, and was frisked. A revolver was found upon the front seat of his vehicle. The vehicle was impounded and the petitioner was given his rights.

Throughout the sequqence of events the petitioner did not appear to be drunk. Up until the time of his arrest he remained calm, collected, and rational. At all times the petitioner knew what he was doing. The petitioner was identified positively by all the witnesses.

On August 15, 1979 an autopsy was performed upon the decedent. Two (2) bullet wounds were found in his head. The second wound was inflicted at point-blank range. This was ascertained due to the presence of powder burns. The cause of death was the severing of the carotid artery which resulted in asphyxiation because the lungs filled with blood.

The defense called a number of character witnesses to testify. They stated that the petitioner was honest and truthful and that he was a peaceful, non-violent person. The petitioner took the stand on his own behalf. He stated that he was taking prescription medication and that the consumption of alcohol caused him to blackout and lose his memory of the events which had transpired. The petitioner also expressed remorse about the events. Upon cross-examination the petitioner mentioned that the pills and the alcohol were consumed voluntarily. The petitioner then stated that although he has some psychological problems, that he did not consider himself insane and that the alcohol did not affect his ability to distinguish between right and wrong.

The defense called two physicians to testify as expert witnesses. The first physician stated that although he found no organic disorder in the petitioner he opined that at the time of the shooting, the petitioner was in a state of psychosis as a result of the combination of the medication and the alcohol consumed by the petitioner. The physician, however, was unable to state that, beyond a reasonable doubt, the petitioner did not know the difference between right and wrong. In addition, the physician mentioned the fact that because a person is mentally ill does not mean that he does not appreciate the consequences of his act.

The second physician stated that he has detected similar reactions in other patients which he has treated as a result of the ingestion of drugs and alcohol. It was his opinion that the petitioner was not consciously aware of what he was doing as a result of an acute organic brain syndrome and that the petitioner did not have the capacity to discriminate between right and wrong.

The State called four (4) rebuttal expert witnesses. None of the witnesses ever had seen such a blackout reaction as a result of the consumption of alcohol and the medication taken by the petitioner. An expert on internal medicine stated that if such a reaction did occur that the petitioner would have been unable to function normally, as he was able to do on March 14. A neurologist testified that this type of blackout reaction would not occur because sedation would result before one's memory would be affected.

SUMMARY OF ARGUMENT

The petitioner failed to preserve any error in the instruction on voluntary intoxication. Furthermore, the instructions submitted to the jury accurately stated the applicable law and the use of the M'Naghten Rule for legal sanity does not violate the Due Process Clause of the Fourteenth Amendment.

REASONS WHY THE WRIT SHOULD BE DENIED

I. INSTRUCTIONS GIVEN TO THE JURY ARE LEFT TO THE DISCRETION OF THE TRIAL COURT AND THE INSTRUCTIONS, CONSIDERED AS A WHOLE, FAIRLY AND ACCURATELY STATED THE APPLICABLE LAW.

A. The Petitioner neither objected to the instruction on voluntary intoxication nor did he submit any instruction designed to correct any impropriety or inadequacy in the trial court's instruction and raised this issue for the first time in his Petition for Rehearing, therefore any error has been waived.

The purpose of an objection in a trial is to draw the alleged error to the attention of the trial court and to provide that court an opportunity to correct any error at the time of trial. *Myers* v. *State*, 623 P.2d 1035 (Okl.Cr. 1981). The objection must be specific enough to apprise the trial judge of the basis of the claim. *United States* v. *D'Amico*, 408 F.2d 331 (2d Cir. 1969). Otherwise the petitioner will not have preserved a question for appellate review. *United States* v. *Anderson*, 471 F.2d 201 (5th Cir. 1973). A petitioner cannot expect silence in the face of trial error to support the reversal of his conviction upon appeal.

Furthermore, one cannot complain of a failure by the court to charge on an issue without calling the attention of the court to the omission by a prayer for instruction. *Humes* v. *United States*, 170 U.S. 210, 18 S.Ct. 602, 42 L.Ed. 1011 (1898).

> "It has long been the settled rule in Federal courts that an instruction by the court must be excepted to

before the case is submitted to the jury in order to be availed of on appeal. This is no merely technical requirement, but is founded upon reason, justice and expediency. If the error is seasonably called to the court's attention, the court can correct it forthwith and thus, obviate the necessity of a new trial." (Citations omitted)

Frederick v. *United States*, 163 F.2d 536, 549 (9th Cir. 1947), *cert. denied*, 332 U.S. 775, 68 S.Ct. 87, 92 L.Ed. 360 (1947); *see Tucker* v. *State*, 151 U.S. 164, 170, 14 S.Ct. 299, 38 L.Ed. 112 (1894).

Henderson v. *Kibbe*, 431 U.S. 145, 97 S.Ct. 1730, 52 L. Ed.2d 203 (1977), also involved jury instructions and is illuminating, therefore, a rather lengthy excerpt is appropriate:

"An appraisal of the significance of an error in the instructions to the jury requires a comparison of the instructions which were actually given with those that should have been given. Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed to be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.

The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is 'whether the ailing instruction by itself so infected the entire

> trial that the resulting conviction violates due process', *Cupp* v. *Naghten*, 414 U.S., at 147, 94 S.Ct., at 400, 38 L. Ed. 2d 368, not merely whether 'the instruction is undesirable, erroneous, or even "universally condemned",' *id.* at 146, 94 S.Ct., at 400." (Footnotes omitted)

431 U.S. at 154. Mr. Chief Justice Burger, concurring in the judgment, stated that:

> "Thus, by failing to object to the jury charge, respondent injected into the trial process the very type of error which the objection requirement was designed to avoid. Federal courts may not overlook such failure on collateral attack." 431 U.S. at 158.

In the case at bar, while the petitioner did request instructions (O.R. 177-186), an examination of the record will reveal that none of the requested instructions were concerned with voluntary intoxication. Prior to the jury being charged, the following conversation transpired:

> "THE COURT: Okay. Okay, how about the Defense; any problem with one through twenty-four instructions proposed by the Court?
>
> MR. SHACKLER: No, sir, and the Court has already ruled and gave refusals on the one that I submitted." (Tr. 904-905)

The petitioner neither objected to the instruction on voluntary intoxication nor did he submit an instruction designed to correct any impropriety or inadequacy in the trial court's instruction. In addition, this issue was not raised during the appeal but rather was raised for the first time in petitioner's Petition for Rehearing (Brief of Petitioner at 6). Any error has been waived.

B. The instructions given to the jury, considered as a whole, fairly and accuratey stated the applicable law.

Assuming, arguendo, that any defect in the instruction had been preserved, the instructions, when viewed in their entirety, accurately stated the applicable law.

The determination of which instructions shall be given to the jury is a matter within the sound discretion of the trial court, provided that the instructions given fairly and accurately state the applicable law.

> "A trial judge need not give an instruction proposed by counsel for either side, provided he gives adequate instructions on each element of the case.
>
> > 'A party has no vested interest in any particular form of instructions . . . the language of the instructions is for the trial court to determine. If on the entire charges it appears that the jury has been fairly and adequately instructed, the requirements of the law are satisfied.' Moore's Manual of Fed. Practice and Procedure, Vol. 5a, § 22.07(2).
>
> See also *Tucker* v. *United States*, 151 U.S. 164, 170, 14 S.Ct. 299, 38 L. Ed. 112 (1893); *United States* v. *Edwards*, 503 F.2d 838, 841 (9th Cir. 1974); *Amsler* v. *United States*, 381 F.2d 37, 52 (9th Cir. 1967); *Rivers* v. *United States*, 368 F.2d 362, 364 (9th Cir. 1966)."

United States v. *Garcia-Rodriquez*, 558 F.2d 956, 965-966 (9th Cir. 1977), *cert. denied*, 434 U.S. 1050, 98 S.Ct. 900, 54 L.Ed.2d 802.

In determining whether a particular instruction submitted to the jury gives rise to reversible error, the court

is required to view the instruction as part of a totality of of the entire instructions given.

> ". . . [W]e accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."

Cupp v. *Naughten*, 414 U.S. 141, 146-147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973).

In *Hopt* v. *People*, 104 U.S. 631, 633-634, 26 L.Ed. 873 (1881), this Honorable Court recognized the general rule that, at common law, voluntary intoxication afforded no excuse, justification or extenuation of a crime committed under its influence but did state that it becomes "a material subject of consideration by the jury" when deliberate premeditation is an element of the charge. In Oklahoma, voluntary intoxication is no defense to criminal culpability. Title 21 of the Oklahoma Statutes, Section 153 provides:

> "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition."

The Oklahoma Court of Criminal Appeals has concluded that an instruction which merely parrots Section 153 is devoid of total consideration of intoxication and recognized a caveat to this statutory authority in *Phillips* v. *State*, 321 P.2d 724, 727 (Okl.Cr. 1958), wherein it was stated:

> ". . . intoxication would not excuse or mitigate the crime, unless accused was so intoxicated that his mental powers were overcome and it was therefore impossible for him to form a criminal intent."

It is proper practice to employ the language of a statute in an instruction when the statute is composed of clear and simple language. *Lumetta* v. *United States*, 362 F.2d 644 (8th Cir. 1966); *Holloway* v. *State*, 550 P.2d 1352 (Okl. Cr. 1976).

The question of intoxication to the point where the accused is unable to form the requisite intent is a question for the jury. *Miller* v. *State*, 567 P.2d 105 (Okl.Cr. 1977). In *Miller* v. *State*, supra, at 109, the trial court gave the following instruction:

> "NO ACT COMMITTED BY A PERSON WHILE IN A STATE OF VOLUNTARY INTOXICATION SHALL BE DEEMED LESS CRIMINAL BY REASON OF HIS HAVING BEEN IN SUCH CONDITION. 'HOWEVER, IF THE ACCUSED WAS IN SUCH A STATE OF INTOXICATION AS TO RENDER HIS MIND INCAPABLE OF FORMING THE SPECIFIC INTENT ESSENTIAL TO THE OFFENSE, HE SHOULD BE FOUND NOT GUILTY.'"

This instruction is almost identical to the one given in the case at bar:

> "You are instructed that no act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition; however, if you find and believe that the defendant was in such a state of intoxication as to render his mind incapable of forming or entertaining this specific intent essential to the offense, he should be found not guilty of said offense."

In *Miller* v. *State*, supra, the Oklahoma Court of Criminal Appeals concluded that the jury had been instructed prop-

erly upon the issue of voluntary intoxication. In the case at bar, the instruction on voluntary intoxication directed the jury to find the petitioner not guilty of the crime for which he was charged (First Degree Murder) if the jury determined that the petitioner was so intoxicated at the time of the acts as to be incapable of forming or entertaining the specific intent essential to the charge of first degree murder. If such a condition of intoxication had been determined to exist, the jury was instructed to consider first degree manslaughter as a lesser included offense.

The jury was instructed and considered voluntary intoxication as a mitigating consideration. The question of intoxication to the point where an accused is unable to form the requisite intent is a question of fact for the jury. The jury concluded that the capacity of the petitioner to appreciate the criminality of his conduct was impaired as a result of intoxication (Trial Court Report at 3, attached hereto as an Appendix). However, the jury determined from the evidence presented that the petitioner's conduct was impaired only slightly as a result of intoxication. The Oklahoma Court of Criminal Appeals also considered the issue and concluded that voluntary intoxication had not been proven.

> "During the State's case in chief, testimony of fourteen lay persons was introduced. These witnesses primarily testified as to Jones' behavior on the day of the homicide, and his conduct and statements subsequent to the shootings. This testimony revealed that the appellant's statements were coherent and he appeared to have full control over his actions. The testimony tended to establish that during the entire episode, he remained calm and mentally capable of understanding

the nature of his acts and was aware of their wrongfulness.

Further, the appellant admitted driving home without any mishap, minutes after the shooting. The witnesses also testified that Jones did not appear to be under the influence of alcohol or drugs during the commission of the crime. Evidence was also introduced as to specific statements made by Jones which tended to show he was cognizant of his conduct. Jones made the following statements:

1. 'Shut your mouth or I'll blow your head off.'

2. 'If I let you live, you'll tell the cops, won't you?'

3. 'I come down here to kill every son-of-a-bitch in here.'

4. 'I've killed every son-of-a-bitch in here, I guess I'll get me a beer.' "

Jones v. *State*, 648 P.2d 1251, 1257 (Okl.Cr. 1982). To state that the Court of Criminal Appeals did not consider the issue of voluntary intoxication (Brief of Petitioner at 13) as a potentially mitigating circumstance is erroneous. It is obvious from the record that the petitioner's mental powers were not overcome by his voluntary intoxication and, therefore, that intoxication will not justify a conviction for a lesser included offense.

This case is unlike *Eddings* v. *Oklahoma*, ... U.S. ....., 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), because in *Eddings* supra, the Oklahoma courts placed limitations upon the mitigating evidence that they would consider. This precluded the jury from hearing evidence as to relevant mitigating factors. In the case at bar, the petitioner was not

precluded from introducing evidence. The petitioner introduced a voluminous amount of evidence as to his mental and emotional background. This was the type of evidence which was not permitted to be introduced in *Eddings*. The petitioner developed his theories of insanity, of unconsciousness, and of intoxication. Merely because the jury concluded that the petitioner's mental powers were not overcome by his intoxication does not mean that the courts did not consider the issue of intoxication as a mitigating circumstance. The jury chose to disbelieve the petitioner's defense and the record reflects that they were justified in doing so. The instructions submitted to the jury were proper and no error has resulted.

II. THE MANNER IN WHICH THE M'NAGHTEN RULE OF LEGAL SANITY WAS APPLIED, WHICH IS THE SOLE TEST USED WITHIN THE STATE OF OKLAHOMA, DID NOT DEPRIVE THE PETITIONER OF DUE PROCESS.

The test of criminal responsibility in Oklahoma is the M'Naghten Rule; it is the sole and exclusive test used. A person who was capable of distinguishing right from wrong at the time an act was committed is to be held responsible for that act. *Matter of M.E.*, 584 P.2d 1340, 1347 (Okl.Cr. 1978), *cert. denied*, 436 U.S. 921, 98 S.Ct. 2271, 56 L.Ed.2d 763 (1978). The Oklahoma Court of Criminal Appeals has been requested to abandon this rule but has declined to do so. "[T]he M'Naghten Rule is the present and exclusive test in this State to determine the question of sanity." *Richardson* v. *State*, 569 P.2d 1018, 1019-1020 (Okl.Cr. 1977). The petitioner contends that ". . . it is entirely possible for an accused to be convicted of a crime of murder in the

first degree even though the accused may not have been able to differentiate between right and wrong at the time of the commission of the offenses" (Brief of Petitioner at 8-9). Such a contention does not comport with the law within this State. Moreover, the petitioner did not, and is unable to, support such a contention with a citation of relevant authority.

The M'Naghten test of criminal responsibility is not constitutionally infirm. The question as to whether the M'Naghten Rule works as a deprivation of due process is not unique; the issue was addressed by this Court in *Leland* v. *Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1032 (1952). The Oregon law which was challenged in *Leland* required that a defendant prove insanity beyond a reasonable doubt. The Court held that placing the burden of proving insanity, beyond a reasonable doubt, upon the defendant was not a violation of due process. The Court further stated that:

> "The science of psychiatry has made tremendous strides since that test was laid down in M'Naghten's Case, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law."

Id., at 800-801. In *Phillips* v. *Hocker*, 473 F.2d 395 (9th Cir. 1973), the Ninth Circuit held that since *Leland* permitted Oregon to require that the defendant prove his insanity beyond a reasonable doubt, the Nevada statute which imposed upon a defendant the burden of proving insanity by a preponderance of the evidence would certainly not violate the due process clause. While it is true that the burden

of establishing the essential elements of the charge remains with the prosecution, the burden of establishing insanity as an affirmative defense may be placed upon the defendant.

> "Therefore, so long as the trial court charged the jury that it was the state's burden to prove beyond a reasonable doubt every element necessary to constitute the crime of first degree murder, there would be no constitutional violation of due process of law even though the appellant was required to maintain the burden on the issue of his insanity defense."

Hill v. *Lockhart*, 516 F.2d 910, 912 (8th Cir. 1975). The Eighth Circuit reaffirmed its position in *Duisen* v. *Wyrick*, 566 F.2d 616 (8th Cir. 1977), when it determined that placing the burden of proving insanity upon the defendant was not a violation of due process.

The United States Supreme Court gave *Leland* v. *Oregon*, supra, continuing viability in *Patterson* v. *New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). The Court, at 201-202, stated that:

> ". . . it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of Justice as rooted in the traditions ranked as fundamental.' "

The Court further stated that:

> ". . . although the State could go too far in shifting the burden of proof to a defendant in a criminal case, the Due Process Clause did not invalidate every in-

stance of burdening the defendant with proving an exculpatory fact.

The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."

Id., at 203, n. 9. An affirmative defense, such as insanity, constitutes an issue separate and distinct from the elements of the crime. The defendant is required to carry the burden of persuasion for an affirmative defense. Proof of the elements of a crime does not require the State to disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses.

"To recognize at all a mitigating circumstance does not require the State to prove its non-existence in each case in which the fact is put in issue, if in its judgent this would be too cumbersome, too expensive, and too inaccurate."

Id., at 209. The Court at 210, went on to hold that:

". . . the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. *Proof of the nonexistence of all affirmative defenses has never been constitutionally required;* and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here." (emphasis added)

In the case at bar, the jury was instructed upon the defense of insanity. Instruction No. 14 (O.R. 149) states in part that:

> "You are further instructed that the defendant has interposed as one of his defenses in this case the plea that he was temporarily insane at the time of the alleged commission of the crimes. That where this defense is sought to be established, the legal presumption of sanity must be overcome by evidence which is sufficient to raise *a reasonable doubt* of the Defendant's sanity at the time of the commission of the crime. *It does not require that the Defendant shall prove his insanity to the satisfaction of the minds of the jury by competent evidence beyond a reasonable doubt, or by a preponderance of the evidence. It is sufficient if he only introduces sufficient evidence to raise in your minds a reasonable doubt of his sanity.*" (emphasis added)

The presumption of sanity is overcome by a reasonable doubt. This is a light burden of proof compared to *Leland* which required proof beyond a reasonable doubt and *Phillips* which required a preponderance of the evidence. The Due Process Clause is not violated when a defendant is required to maintain the burden of raising a reasonable doubt as to his sanity because insanity is an affirmative defense. The M'Naghten Rule was not applied in a restrictive manner. The issue of voluntary intoxication was considered, however, it was not proven. The petitioner attempts to draw a distinction between a "pure" and a "restrictive" M'Naghten test (Brief of Petitioner at 13). Such a distinction is not recognized within this State.

The M'Naghten test is not constitutionally infirm. It was applied in a proper manner and in no way precluded the petitioner from having the jury consider any mitigating circumstances.

CONCLUSION

The Oklahoma Court of Criminal Appeals has acted consistently with the decisions of this Court and concluded that the rights of the petitioner were not violated. This case simply does not merit expenditure of the Court's scarce resources. Certiorari should be denied.

The State, having answered the Petitioner's assignment of error by both argument and citation of authority, respectfully requests this Honorable Court to deny the Petitioner's Writ of Certiorari.

Respectfully submitted,

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APPENDIX

[Excerpt from Report of Trial Judge]

* * *

	Instructed	*Found*
f. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony.	[ ]	[ ]
g. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.	[X]	[ ]

6. List nonstatutory aggravating circumstances indicated by the evidence, if any.

   a. None

* * *

7. Was there evidence of mitigating circumstances?
   Yes [X] No [ ]

8. If so, which of the following mitigating circumstances was in evidence?

   a. The defendant has no significant history of prior criminal activity ..... [X]

   b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance ..... [X]

* * *

   f. The defendant acted under duress or under the domination of another person ..... [X]

   g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct to the requirements of law was impaired as a result of mental disease or intoxication ..... [X]

* * *